

August 13, 2020, Agenda – Open Meeting Matter

July 14, 2020, Agenda – Open Meeting Matter

March 26, 2020, Agenda – Open Meeting Matter

February 4, 2020, Agenda – Open Meeting Matter

January 9, 2020, Agenda – Open Meeting Matter

To: The Board

From: Chad H. Gholizadeh

Date: August 6, 2020

Re: Proposed Amendments to Board Rules § 1-07: Post-Employment

As directed by the Board at its July 2020 meeting, Staff revised two sections of the proposed rule codifying the Board's interpretation and application of Chapter 68's post-employment restrictions. These revisions clarify (1) the scope of a former public servant's prohibition on appearing before a board or commission on which a representative of their former agency sits and (2) when a public servant becomes a former public servant for the purposes of Chapter 68.

If the Board approves the proposed rule, it will return to the Law Department and the Mayor's Office of Operations for certification. After it receives a new certification, Staff will publish the proposed rule in the City Record for public comment in advance of a public hearing, as required by the City Administrative Procedure Act. See Charter § 1043(d).

Attached are the following:

- 1) Minutes of the January 2020 Open Meeting (**Exhibit 1**);
- 2) Minutes of the February 2020 Open Meeting (**Exhibit 2**);
- 3) Minutes of the March 2020 Open Meeting (**Exhibit 3**);
- 4) Minutes of the July 2020 Open Meeting (**Exhibit 4**);
- 5) Draft Notice of Public Hearing and Opportunity to Comment (**Exhibit 5**); and

- 6) Draft Notice of Public Hearing and Opportunity to Comment, with changes tracked to the version discussed at the July 2020 Open Meeting (**Exhibit 6**).

Minutes of the Open Meeting of the New York City Conflicts of Interest Board

Date: January 9, 2020

Location: Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, New York

Present:

Board Members: Chair Richard Briffault and Members Fernando A. Bohorquez, Jr., Anthony Crowell, Jeffrey D. Friedlander, and Erika Thomas.

Board Staff: Ethan Carrier, Chad Gholizadeh, Ana Gross, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Yasong Niu, Jeffrey Tremblay, Clare Wiseman, and Juliya Ziskina.

Guests: Thomas Speaker, Reinvent Albany

The meeting was called to order by the Chair at approximately 10:15 a.m. The Chair stated that the meeting was being conducted pursuant to the New York State Open Meetings Law and designated the undersigned as the Recording Secretary for purposes of the meeting.

The Chair stated that the meeting was called to discuss proposed amendments to Board Rules §§ 1-13, 1-17, 1-07, and 1-01(h).

Board Rules §§ 1-13 and 1-17

After a brief introduction, the Chair asked for any comments by the Board or Staff.

The following comments constitute the changes as agreed upon by the Board and Staff to the proposed amendments to Board Rules §§ 1-13 and 1-17:

- Statement of Basis and Purpose, p. 3, line 7: revise paragraph to clarify which bullet points refer to the two Advisory Opinions
- Explain in Statement of Basis and Purposes that the three options in Board Rules § 1-13(c)(1)(ii) are disjunctive
- Board Rules § 1-13(f): replace “themselves” with “their position”

Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the changes as discussed as the final rules.

Board Rules § 1-07

After an introduction by Staff, the Chair asked for any comments by the Board or Staff.

The following constitutes the comments by the Board and Staff:

§ 1-07(a) Post-Employment Appearances:

- Start Board Rules § 1-07(a) with core prohibited conduct from the City Charter
- End Board Rules § 1-07(a)(2) after the word “matters.”
- Incorporate the examples listed in Board Rules § 1-07(a)(2)(i) through (iii) into the Statement of Basis and Purpose

- Harmonize use of “appear” instead of “communicate” throughout rule

§ 1-07(b): Date of Termination of City Service: No comments

§ 1-07(c): Waivers of Post-Employment Restrictions

The Board and Staff discussed generally the history, purpose, and reasons for codifying into a rule the factors to be used in granting waivers of post-employment restrictions. The discussion focused on what factors should be considered, the revision and reformatting of language for clarification, and the inclusion of the historic four-factor “exigent circumstances” test and a detailed analysis of the Advisory Opinions in the Statement of Basis and Purpose. The discussion concluded with the Board and Staff agreeing that the rule would provide guidance to both the public servant requesting the waiver and to the Board and Staff in deciding to grant or deny the request.

The following constitutes specific changes as agreed upon by the Board and Staff:

- Board Rules § 1-07(c)(1); remove “and that is benefits the City”
- Board Rules § 1-07(c)(1): replace “bv weighing each of the” with “ “including but not limited to” language with respect to the individual factors
- Board Rules § 1-07(c)(1)(iii) and (x): move these two factors into another section
- Board Rules § 1-07(c)(1)(iv) and (v): consider combining into one factor
- Board Rules § 1-07(c)(1)(vii): consider revising so that it is clear to in which direction the factor flows
- Board Rules § 1-07(c)(1)(viii); clarify about inside information/connections
- Board Rules § 1-07(c)(1)(ix): replace “fewer than 60 days” with general language such as “relatively short period of time”
- Add as a factor the third factor from the four-factor exigent circumstances test concerning likelihood of harm to other similar organizations
- Combine other factors wherever possible so that there are fewer factors
- Add to Statement of Basis and Purpose the four-factor “exigent circumstances” test and an explanation of why the Board is moving away from that test
- Reorganize the Statement of Basis and Purposes in order to group the Advisory Opinions by subject area rather than the string cite on pages 2 and 3.

§ 1-07(d): Consulting for a Former City Agency:

- Board Rules § 1-07(d)(1)(ii): replace “six months” with non-specific time frame, proportional to the work being undertaken
- Board Rules § 1-07(d)(2): replace “subsequent employer” with “private firm”
- Board Rules § 1-07(d)(2)(ii): remove “substantial”

Upon motion duly made and seconded, the Board unanimously voted to continue discussions at the next open meeting.

Board Rules § 1-01(h)

After a brief introduction, the Chair asked for any comments by the Board or Staff. The Board and Staff agreed to replace “a” with “the” in Board Rules §1-10(h)(1)(iv).

Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the one change discussed as the final rule.

The open meeting was adjourned at approximately 11:25 a.m.

Respectfully submitted,

Julia H. Lee
Recording Secretary

Minutes of the Open Meeting of the New York City Conflicts of Interest Board

Date: February 4, 2020

Location: Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, New York

Present:

Board Members: Chair Richard Briffault and Members Fernando A. Bohorquez, Jr., Anthony Crowell, Jeffrey D. Friedlander, and Erika Thomas.

Board Staff: Ethan Carrier, Chad Gholizadeh, Ana Gross, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Yasong Niu, Jeffrey Tremblay, Clare Wiseman, and Juliya Ziskina.

Guests: Thomas Speaker, Reinvent Albany

The meeting was called to order by the Chair at approximately 9:35 a.m. The Chair stated that the meeting was being conducted pursuant to the New York State Open Meetings Law and designated the undersigned as the Recording Secretary for purposes of the meeting.

The Chair stated that the meeting was called to discuss proposed amendments to Board Rules § 4-05, Chapter 3, § 1-18, and § 1-07.

Board Rules § 4-05

After a brief introduction, the Chair asked for any comments by the Board or Staff.

There were no comments. Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules Chapter 3

After a brief introduction, the Chair asked for any comments by the Board or Staff.

There were no comments. Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules § 1-18

After a brief introduction, the Chair asked for any comments by the Board or Staff.

In the Statement of Basis and Purpose, the Board asked, and Staff agreed, to cite to examples from the advisory opinions to clarify the term “demonstrable nexus.”

Upon motion duly made and seconded, the Board unanimously voted to continue discussions at the next open meeting.

Board Rules § 1-07

After a brief introduction, the Chair asked for any comments by the Board or Staff.

The following comments constitute the changes as agreed upon by the Board and Staff to the proposed amendments to Board Rules § 1-07:

In the Statement of Basis and Purpose:

- Insert a sentence or two in the introduction to provide context for the purpose of the rule
- Include a list of the advisory opinions incorporated and not incorporated in the rule
- p. 4, carryover sentence: remove “switching sides” and replace “appearances” with “working paid or unpaid,”
- p. 11, line 12: insert “this” before factor
- p. 12, line 1: heading number to be changed to 3

In the text of Board Rules § 1-07:

- Insert “former” before “public servant” where applicable throughout rule
- § 1-07(c)(1): revise “may waive” to “in determining whether to waive the post-employment restrictions, the Board will consider” to make clear it is the Board’s determination
- § 1-07(c)(1)(ii): replace “placed” with “suited”
- § 1-07(c)(1)(iv): Insert a period after employer and delete the rest of the sentence. Incorporate 1 and 2 into the Statement of Basis and Purpose
- § 1-07(c)(1)(iv): change wording to the negative, so that a positive answer would weigh in favor of the granting of a waiver, consistent with (i)-(iii)
- § 1-07(c)(2)(i): delete “made by City agencies”
- § 1-07(d)(1): rethink the language referring to the completion of a project to properly reflect the type of consulting work addressed in the rule
- § 1-07(d)(1)(iv): replace “significantly higher” with “similar to” or “comparable to”
- Insert additional subsection stating that in the event a proposed consulting arrangement does not meet the requirements of § 1-07(d)(1) a waiver from the Board can be sought
- § 1-07(d)(2)(i): revise to state that the former public servant did not have a role in recommending or selecting the private firm

Upon motion duly made and seconded, the Board unanimously voted to continue discussions at the next open meeting.

The open meeting was adjourned at approximately 10:30 a.m.

Respectfully submitted,

Julia H. Lee
Recording Secretary

Minutes of the Open Meeting of the New York City Conflicts of Interest Board

Date: March 26, 2020

Present:

Board Members: Chair Richard Briffault and Members Fernando A. Bohorquez, Jr., Anthony Crowell, Jeffrey D. Friedlander, and Erika Thomas

Board Staff: Ethan Carrier, Chad Gholizadeh, Ana Gross, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Yasong Niu, Jeffrey Tremblay, Clare Wiseman, and Juliya Ziskina.

Guests: None

The Board and Staff participated by videoconference pursuant to Executive Order No. 202 issued on March 7, 2020. The meeting was called to order by the Chair at approximately 9:35 a.m. The Chair stated that the meeting was being conducted pursuant to the New York State Open Meetings Law and designated the undersigned as the Recording Secretary for purposes of the meeting.

The Chair stated that the meeting was called to discuss proposed amendments to Board Rules § 1-07; § 1-01(h); § 1-01(e)-(g); § 1-18; § 1-13; and §1-17.

Board Rules § 1-07

After a brief introduction, the Chair asked for any comments by the Board or Staff. The following comments constitute the changes as agreed upon by the Board and Staff to the proposed amendments to Board Rules § 1-07:

- In the Statement of Basis and Purpose, p. 4, line 10: change “unpaid or unpaid” to “paid or unpaid”
- § 1-07(d)(2)(i): replace “in role” with “no role”

Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules § 1-01(h)

After a brief introduction, the Chair asked for any comments by the Board or Staff. There were no comments. Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules § 1-01(e)-(g)

The Chair asked for any comments by the Board or Staff and upon motion duly made and seconded, the Board unanimously voted to continue discussions at a future open meeting.

Board Rules § 1-18

The Chair asked for any comments by the Board or Staff. The Board and Staff agreed to change the caption from “Endorsements” to “Use of City Title in Promotional Materials.”

Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules §§ 1-13 and 1-17

After a brief introduction, the Chair asked for any comments by the Board or Staff. There were no comments. Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

The open meeting was adjourned at approximately 10:02 a.m.

Respectfully submitted,

Julia H. Lee
Recording Secretary

Minutes of the Open Meeting of the New York City Conflicts of Interest Board

Date: July 14, 2020

Present:

Board Members: Chair Jeffrey D. Friedlander and Members Fernando A. Bohorquez, Jr., Anthony Crowell, Wayne Hawley, and Nisha Agarwal

Board Staff: Ethan Carrier, Chad Gholizadeh, Ana Gross, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Yasong Niu, Jeffrey Tremblay, Clare Wiseman, and Juliya Ziskina.

Guests: None

The Board and Staff participated by videoconference pursuant to Executive Order No. 202 issued on March 7, 2020. The meeting was called to order by the Chair at approximately 9:32 a.m. The Chair stated that the meeting was being conducted pursuant to the New York State Open Meetings Law and designated the undersigned as the Recording Secretary for purposes of the meeting.

The Chair stated that the meeting was called to discuss proposed amendments to Board Rules §§ 4-01, 4-02, 4-03, 1-01(c), and 1-07.

Board Rules §§ 4-01 to 4-03

After a brief introduction, the Chair asked for any comments by the Board or Staff. The following constitutes the changes agreed upon by the Board and Staff:

- Statement of Basis & Purpose, p. 4, ln. 2: change “a report filed in 2014” to “a 2013 report”
- Statement of Basis & Purpose, p. 4, ln. 4: change “would permit” to “would require”
- § 4-01: No comments
- § 4-02(a): Insert “close of” before “calendar year”
- § 4-02(b): Change “the enforcement of criminal laws” to “law enforcement”
- § 4-03: No comments

The Board unanimously agreed to adopt the proposed amendments incorporating the proposed changes as the final rule to be sent to the Law Department and the Mayor’s Office of Operations for review.

Board Rules § 1-01(c)

After a brief introduction, the Chair asked for any comments by the Board or Staff. The following constitute the changes agreed upon by the Board and Staff:

- § 1-01(c)(1): include additional safeguards or restrictions on gifts that may be accepted from a “family member.”
- § 1-01(c)(3): revise so as not to preclude friendships made during City service; and to clarify what is meant by “independent”.

The Board agreed to continue discussions at a future open meeting.

Board Rules § 1-07

After a brief introduction, the Chair asked for any comments by the Board or Staff. The following comments constitute the changes agreed upon by the Board and Staff:

- § 1-07(a)(1): revise to clarify that prohibition applies to an appearance only before a representative of the former agency who sits on a board, commission, or other governmental entity other than the former agency
- § 1-07(b)(1): revise definition of the date of termination by replacing “or” with an inclusive conjunction to incorporate last day of official duties and the cessation of benefits and removing the phrase “after resigning, retiring, or being terminated”

The Board agreed to continue discussions at a future open meeting.

The open meeting was adjourned at approximately 10:36 a.m.

Respectfully submitted,
Julia H. Lee
Recording Secretary

1 New York City Conflicts of Interest Board

2
3 **Notice of Public Hearing and Opportunity to Comment on Proposed Rules Regarding Post-**
4 **Employment Restrictions**
5

6 **What are we proposing?** The Conflicts of Interest Board is proposing to establish rules governing the
7 issuance of waivers of the post-employment restrictions and the definition of terms related to those
8 restrictions.

9
10 **When and where is the Hearing?** The Conflicts of Interest Board will hold a public hearing on the
11 proposed rule. The public hearing will take place by videoconference at [time] on [date] and is accessible
12 by:

- 13
14 • **Internet Video and Audio.** To access the hearing by Zoom, use the following URL: [].
15
16 • **Telephone.** To access the hearing by telephone, dial []. When prompted, use the following
17 access code [] and password [].
18

19 **How do I comment on the proposed rules?** Anyone can comment on the proposed rules by:

- 20
21 • **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules
22 website at <http://rules.cityofnewyork.us>.
23
24 • **Email.** You can email comments to Chad H. Gholizadeh at Rules@COIB.nyc.gov
25
26 • **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public
27 hearing may speak for up to three minutes. Please access the public hearing by internet video and
28 audio or by telephone using the instructions above. It is recommended, but not required, that
29 commenters sign up prior to the hearing by contacting the Conflicts of Interest Board by phone at
30 (212) 437-0730 or by email at lee@coib.nyc.gov.
31

32 **Is there a deadline to submit comments?** Yes, you must submit written comments by [date].
33

34 **Do you need assistance to participate in the hearing?** You must tell the Conflicts of Interest Board if
35 you need a reasonable accommodation of a disability at the hearing, including if you need a sign language
36 interpreter or simultaneous transcription. You can advise us by email at lee@coib.nyc.gov or by telephone
37 at (212) 437-0730. You must tell us by [date].
38

39 **Can I review the comments made on the proposed rules?** You can review the comments made online
40 on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. Copies of all comments
41 submitted online, copies of all written comments, and a summary of oral comments concerning the
42 proposed rule will be available to the public on the Conflicts of Interest Board's
43 website(<https://www1.nyc.gov/site/coib/public-documents/open-meetings-and-public-hearings.page>) as
44 soon as practicable.
45

1 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043, 2603(a), and
2 2603(c)(4) of the City Charter authorize the Conflicts of Interest Board to promulgate this proposed rule.

3
4 **Where can I find the Conflicts of Interest Board's rules?** The Conflicts of Interest Board's rules are
5 in Title 53 of the Rules of the City of New York. The proposed rule was included in the agency's FY '21
6 Regulatory Agenda.

7
8 **What rules govern the rulemaking process?** The Conflicts of Interest Board must meet the
9 requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made
10 according to the requirements of Section 1043 of the City Charter.

11 12 **STATEMENT OF BASIS AND PURPOSE**

13 The post-employment restrictions of Chapter 68 of the City Charter, contained in Charter
14 § 2604(d), seek to balance two competing City interests:

15 (1) the need to recruit to public service talented individuals who may wish to return to or
16 pursue private sector employment after their City service, and

17 (2) the need to prevent public servants from trading on connections made in City
18 government service or using confidential City information for the benefit of themselves or future
19 employers.

20 See Volume I, Report of the New York City Charter Revision Commission, December
21 1986 – November 1988, at 28-29; see also Advisory Opinions (“A.O.”) Nos. 1993-11 at 6, 1993-
22 12 at 4, 1994-15 at 11-12, and 1996-1 at 7.

23 Since it was established in 1989, the Board has issued 31 advisory opinions, totaling 210
24 pages, providing guidance on the application of the post-employment restrictions set forth in
25 Charter § 2604(d) and on how the Board has considered requests for waivers of those restrictions.
26 Because of the limited scope and duration of the post-employment restrictions, requests for
27 waivers of Charter § 2604(d) are never merely technical, and the Board has engaged in a detailed
28 review of the competing interests at issue in each request. With the benefit of almost 30 years of

1 experience in evaluating requests for post-employment waivers, and in fulfillment of the mandate
2 of Charter § 2603(c)(4) to determine which of its advisory opinions “has interpretative value in
3 construing provisions of this chapter,” the Board proposes to codify:

- 4 • Definitions of terms within Charter § 2604(d), such as “agency served” and “termination
5 of service.”
- 6 • A new “totality of the circumstances” standard with a non-exclusive list of four factors,
7 drawn from advisory opinions, the Board will consider when evaluating requests for
8 waivers of the post-employment restrictions.
- 9 • The standard, also drawn from advisory opinions, for evaluating a unique type of post-
10 employment work: consulting for one’s former City agency, known as “consulting
11 back.”

12 The proposed rule addresses the following 22 advisory opinions:

13 A.O. No. 1991-8, A.O. No. 1991-19, A.O. No. 1992-13, A.O. No. 1992-17,
14 A.O. No. 1992-37, A.O. No. 1992-38, A.O. No. 1993-11, A.O. No. 1993-
15 12, A.O. No. 1993-18, A.O. No. 1993-30, A.O. No. 1994-15, A.O. No.
16 1994-19, A.O. No. 1994-22, A.O. No. 1995-1, A.O. No. 1996-1, A.O. No.
17 1998-11, A.O. No. 2000-2, A.O. No. 2008-1, A.O. No. 2008-4, A.O. No.
18 2009-5, A.O. No. 2012-2, and A.O. No. 2019-1.

19 Certain post-employment issues considered by the Board are not the subject of this
20 rulemaking, specifically the advisory opinions interpreting Charter § 2604(d)(6), which the Board
21 reserves for the subject of possible future rulemaking. See A.O. No. 1993-13, A.O. No. 1994-7,
22 A.O. No. 1994-21, A.O. No. 1997-1, and A.O. No. 1999-3. The Board is not adopting A.O. Nos.
23 1989-1, 1992-2, 1992-32, and 2007-1, which apply only to the public servants who requested those
24 opinions.

25 **1. Definitions**

26 **a. Post-Employment Appearances**

1 Proposed Board Rules § 1-07(a)(1) would codify the Board’s long-standing interpretation
2 that the prohibitions in Charter §§ 2604(d)(2), 2604(d)(3), and 2604(d)(4) against a former public
3 servant from appearing before or communicating with a former agency or branch of government
4 served include appearances before or communications with representatives of that agency or
5 branch serving on a City board or commission. For example, an employee of the New York City
6 Department of Housing Preservation and Development (“HPD”) would be prohibited by Charter
7 § 2604(d)(2) from appearing at a meeting of the board of the New York City Housing Development
8 Corporation (“HDC”) within the the former HPD employee’s first post-employment year if the
9 HPD representative sitting on the HDC board is participating in that meeting. See A.O. No. 2008-
10 1 (advising that when a public servant simultaneously holds positions at multiple City agencies the
11 post-employment appearance restriction of Charter § 2604(d)(2) applies to each position); see also
12 COIB v. Sirefman, COIB Case No. 2007-847 (2009) (fining the former Interim President of the
13 New York City Economic Development Corporation (“EDC”) \$1,500 for appearing before the
14 Hudson Yards Development Corporation (“HYDC”) within one year of his resignation from EDC
15 because the current EDC President was present at a meeting attended by the former Interim
16 President in the EDC President’s capacity as an *ex-officio* Member and Director of HYDC). By
17 contrast, a former HPD employee would not be prohibited from communicating with other
18 employees of HDC, nor would the former employee be prohibited from communicating with or
19 appearing before meetings of the HDC board from which the HPD representative was absent or
20 recused.

21 Proposed Board Rules § 1-07(a)(2) would codify the Board’s interpretation that the
22 appearance and communication restrictions of Charter § 2604(d) exclude appearances and
23 communications related to non-City matters. In particular, the Board has advised public servants

1 that the following communications are not prohibited by Charter § 2604(d): (1) social
2 communications; (2) soliciting a public servant's personal legal business or other types of personal
3 services; and (3) seeking an endorsement for a run for political office. See A.O. No. 2009-5
4 (advising a former public servant that the post-employment appearance restriction did not prohibit
5 communication with a current public servant in their private capacity, such as reaching out to
6 perform personal legal work, asking them to leave City employment to join the former public
7 servant's new firm, or soliciting a political endorsement).

8 **b. Date of Termination of City Service**

9 To advise a public servant about the applicability of Charter § 2604(d), the Board must
10 determine when the public servant's City service ended. In proposed Board Rules § 1-07(b)(1),
11 the Board would incorporate the method of calculating the date of a public servant's termination
12 from City service set forth in A.O. Nos. 1998-11 and 2019-1: that is, the later of either the last day
13 a former public servant performed official City duties or the last day the public servant received
14 benefits conditioned upon current City employment after resigning, retiring, or being terminated.
15 The one-year appearance prohibition of Charter § 2604(d)(2) would run from that date.

16 In proposed Board Rules § 1-07(b)(2), the Board would retain the substance of existing
17 Board Rules § 1-07 and would codify A.O. No. 2008-1 for public servants who serve multiple City
18 agencies. See also A.O. No. 1993-30 (providing advice on the tolling dates of the one-year
19 appearance restriction to a public servant who served two agencies in succession before leaving
20 City service). The proposed rule would clarify that a former public servant who has served more
21 than one City agency, concurrently or sequentially, is prohibited from appearing before each such
22 agency for one year after the termination of service, as determined by proposed Board Rules § 1-
23 07(b)(1), with each such agency.

1 **2. Otherwise Prohibited Conduct**

2 **a. Waivers of the Post-Employment Restrictions**

3 In contrast to the broad prohibitions against full-time public servants having ownership
4 interests in or positions at firms that do business with any City agency, for the vast majority of
5 public servants, the post-employment appearance restrictions apply only to a former public
6 servant's communications with their former employing City agency or branch of government and
7 only for one year after leaving City service. Similarly, the lifetime post-employment particular
8 matter restriction applies only to a narrow set of matters (as defined in Charter § 2601(17)) on
9 which a former public servant worked personally and substantially while in City service. See, e.g.,
10 A.O. No. 1992-38 (advising that a public servant was not prohibited from working on a project
11 where her involvement had been personal but not substantial).

12 However, because public servants requesting waivers of the post-employment restrictions
13 are seeking to engage in conduct in which the relationships developed in their former City position
14 may influence decision-making by their former City agency, or that may put them in a position to
15 utilize their superior familiarity with, and ability to navigate, the subtle culture of their former
16 agency to achieve preferential treatment for their private employer, or involve the exact particular
17 matters on which the former public servant personally and substantially worked while in City
18 service, the Board has analyzed requests for waivers of the post-employment restrictions
19 differently from waivers of other provisions of Chapter 68.

20 In evaluating the many requests for waivers it has received, the Board has sought to balance
21 adhering to the post-employment restrictions of the Charter with the asserted need for a particular
22 former public servant to engage in otherwise prohibited conduct to further an identified City
23 interest. In A.O. No. 1991-8, the Board announced that it would issue waivers of Chapter 68's

1 post-employment restrictions “sparingly, and only in exigent cases.” A.O. No. 1991-8 at 2-3; see
2 also A.O. No. 1992-13 (declining to issue a waiver to a public servant seeking to communicate
3 with their former branch of government on behalf of a private employer).

4 The Board has traditionally considered four factors when evaluating requests for post-
5 employment waivers:

6 (1) the relationship between the City and the public servant’s private employer;

7 (2) the benefits to the City (as opposed to the public servant) if the waiver were granted;

8 (3) the likelihood of harm to other organizations similar to, or in competition with, a public
9 servant’s prospective employer if the waiver were granted; and

10 (4) the extent to which the public servant has unique skills or experience suited to the
11 particular position that the prospective employer would be hard-pressed to find in another person
12 (see, e.g., A.O. No. 2012-2).

13 In applying this long-utilized test, the Board has determined that, when the former public
14 servant’s private employer was a not-for-profit organization working in a public-private
15 partnership with the City in which the private employer and the City share an identity of interest,
16 all four factors “need not be satisfied.” A.O. No. 2000-2 at 4; see A.O. No. 2008-4. The Board
17 has further explained that, for private employers that devote substantial private resources to
18 support the work of a City agency but which do not meet the standard of a public-private
19 partnership, requests for waivers will “be analyzed in light of [the private employer’s] hybrid
20 status.” A.O. No. 2008-4 at 10.

21 Since 1991, the Board has grappled with articulating and applying a standard to requests
22 for waivers of the post-employment restrictions that would fulfill the objectives of the post-
23 employment restrictions while also addressing the needs of City agencies and the City’s changing

1 relationship with not-for-profit partners. Over the course of these years, it has become clear that
2 the Board would benefit from the consideration of a more complete set of circumstances. Proposed
3 Board Rules §1-07(c)(1) would codify a new “totality of the circumstances” standard for
4 determining whether a waiver of the post-employment restrictions would conflict with the
5 purposes and interests of the City. As part of how the Board would evaluate the totality of the
6 circumstances, proposed Board Rules §1-07(c)(1) would include a non-exhaustive list of four
7 factors drawn from the Board’s past deliberations on post-employment waivers.

8 Proposed Board Rule § 1-07(c)(1)(i): When a former public servant’s work for a private
9 employer involves furthering an interest identical to that of the City, there are diminished concerns
10 about such former public servant using their special access or knowledge to the detriment of the
11 City’s interests. Therefore, the Board has historically been more likely to grant requests for
12 waivers for former public servants who work for entities that the City controls or effectively
13 controls. See A.O. 2008-4 (observing that the Board would look favorably upon requests to work
14 for City-affiliated not-for-profits when those entities were created by City agencies and had a
15 governing structure that involved public officials as officers or board members). Additionally, in
16 the past the Board has granted waivers in situations where the former public servant’s private
17 employer operates as a public-private partnership with the City and devotes substantial private
18 resources to support the work of a City agency. See A.O. No. 2008-4 (stating that, “[w]hen the
19 City and [a private employer] share an ‘identity of interest,’ the City benefits from encouraging
20 former City employees to effectively remain in public service” by working for that private
21 employer); A.O. No. 1994-22 (granting a waiver for a public servant to take a position at a bio-
22 medical facility which operated as a joint venture between the City, the State, and a university).

1 Proposed Board Rule § 1-07(c)(1)(ii): When a former public servant is uniquely suited to
2 perform work that would benefit the City, rather than their private employer, the proposed post-
3 employment activities do not conflict with the purposes and interest of the City. See A.O. No.
4 2012-2 (stating that, in evaluating a request for a waiver of the post-employment restrictions, “the
5 Board looks for a demonstration of the benefit *to the City*, not to the new employer”) (emphasis in
6 original). The potential benefit to the City has been articulated in two ways: either by virtue of the
7 former public servant’s unique technical or professional expertise or because at a small not-for-
8 profit, there is no other employee able to do the prohibited work. See A.O. No. 1992-17 (granting
9 a public servant a waiver of the post-employment restrictions to work for an entity when his
10 expertise would help remedy contractual disputes between the entity and the agency); A.O. No.
11 1994-19 (granting a waiver of Charter § 2604(d)(3) when a public servant’s proposed
12 communications on behalf of a not-for-profit entity would primarily benefit the City).

13 Proposed Board Rule § 1-07(c)(1)(iii): Because public servants who have worked for the
14 City for brief periods of time are less likely than those who served for extended periods of time in
15 City government to have developed the type of connections that could afford them undue influence
16 or unfair access, the Board has issued post-employment waivers for these public servants more
17 readily. See COIB Case No. 2019-463 (40 days); COIB Case No. 2017-790 (36 days); COIB Case
18 No. 2017-214 (38 days); COIB Case No. 2015-646 (40 days); COIB Case No. 2013-381 (granting
19 a waiver for a former paid summer intern). Additionally, public servants whose City service was
20 part-time on a consultative body have been granted post-employment waivers more frequently in
21 light of the limited role they played in City government.

22 Proposed Board Rule § 1-07(c)(1)(iv): A former public servant communicating with their
23 former agency on behalf of a private employer shortly after departing may pose a risk of harm to

1 firms similar to or in competition with that private employer, given the former public servant's
2 familiarity with, and ability to navigate, the processes of their former agency. To mitigate this
3 risk, the Board would continue to disfavor requests in which the former public servant proposes to
4 communicate with units or divisions at the former agency with which he or she worked regularly.
5 See A.O. No. 1993-8 (stating that one of the purposes of the post-employment restrictions was to
6 prevent the exertion of special influence on government decision-making by, among other things,
7 preventing contact with former City colleagues on behalf of a new employer); A.O. No. 1994-15
8 (granting a waiver of the one-year appearance restriction for a public servant working for a unique
9 not-for-profit created by New York State to communicate with a unit of his former City agency
10 other than the one for which he worked). Additionally, the Board would continue to disfavor
11 requests for waivers for former public servants who wish to communicate with their former
12 agencies to seek new business for their private employers in the forms of licenses, permits, grants,
13 or contracts. Compare A.O. No. 1992-17 (granting a waiver of the post-employment restrictions
14 to a public servant when her work at a private employer "would help remedy pending contractual
15 disputes between the entity and the agency") with A.O. No. 1993-18 (declining to grant a waiver
16 to a public servant whose work at his private employer would focus, in part, on encouraging the
17 participation of his private employer's clients in programs run by his former City agency); see also
18 A.O. No. 1991-19 (prohibiting a public servant making an otherwise ministerial FOIL request from
19 bypassing normal procedures to contact individuals directly).

20 Additionally, in proposed Board Rules § 1-07(c)(2), the Board would establish two
21 procedural requirements for waivers of the post-employment restrictions. First, the Board would
22 decline to issue waivers when the request is made after undue delay. In considering such requests,
23 the Board's decision-making is hindered by a lack of time to evaluate the specific circumstances

1 of the request as well as the complications that, in the Board's experience, often accompany such
2 requests, most commonly the former public servant having already accepted (or started) a job that
3 requires otherwise prohibited communications. The Board has emphasized this factor to ensure
4 that self-created exigencies do not take precedence over other relevant factors. See A.O. No. 2012-
5 2 (advising that request for waivers of the post-employment restrictions should be submitted in
6 advance of departure from City service); A.O. No. 1992-37 (noting with disapproval that a former
7 public servant did not request a waiver prior to having accepted the position with a private
8 employer).

9 Second, the Board would decline to issue waivers when a former public servant has, in the
10 course of soliciting employment, violated Charter § 2604(d)(1), which requires recusal from any
11 particular matters involving a private employer while soliciting or negotiating for a position with
12 that employer. See A.O. No. 1992-37 (observing that a former public servant's solicitation and
13 negotiation for a position with a private employer that had business dealings with her own agency
14 raised the possibility that a violation of Charter Section 2604(d)(1) had occurred).

15 **3. Consulting for a Former City Agency**

16 As part of its experience applying the post-employment restrictions, the Board has also
17 considered how those restrictions impact the City's ability to retain the expertise held by retiring
18 and departing City employees. The Board's approach to this issue has been informed by Charter
19 § 2604(d)(6), the so-called "government-to-government" exception, which provides that the post-
20 employment restrictions "shall not apply to positions with or representation on behalf of any local,
21 state or federal agency." Historically, the Board has determined that a City agency's consulting
22 agreement with a former employee falls within the government-to-government exception when:
23 (1) the former agency has a pressing need for the former employee's services, (2) the former

1 agency contracts directly with the former employee, not through a firm employing the former
2 public servant, and (3) the contracting compensation is comparable to that of the employee's salary
3 at the time he or she left the agency. See A.O. Nos. 1993-12; 1995-1. Proposed Board Rules § 1-
4 07(d)(1) would provide a new set of five more specific and detailed conditions which, if met,
5 would permit a former public servant to be retained directly, rather than through an employer, as
6 a consultant by the City agency for which he or she worked with the written approval of the agency
7 head. Such written approval must then be provided to the Board, which will post that information
8 on its website.

9 The Board has also reviewed matters where, for reasons of administrative convenience, a
10 City agency seeks to employ a former employee as a consultant through an intermediary entity,
11 rather than directly as a consultant. This often arises when a City agency seeks to retain a public
12 servant as a consultant through a temporary staffing agency with which the agency already has a
13 staffing contract. In this case, because the former public servant would be an employee of the
14 temporary staffing agency or other intermediary entity, the "government-to-government"
15 exception of Charter § 2604(d)(6) would not apply. However, because in many circumstances the
16 consulting arrangement is motivated by the same City purpose that motivates direct consulting
17 arrangements, the Board has often issued waivers to public servants whose former City agencies
18 seek to employ them in this manner when it has determined there is no likelihood that the
19 intermediary entity may reap disproportionate benefits from the City agency's need to retain its
20 former employee. See A.O. No. 1995-1 at 6. In proposed Board Rules § 1-07(d)(2) the Board
21 articulates a standard that such waivers must meet, incorporating the requirements of proposed
22 Board Rules § 1-07(d)(1), but also requiring that the intermediary entity is selected by the City
23 rather than by the public servant.

1 New material is underlined.

2 Section 1. Section 1-07 of Chapter 1 of Title 53 of the Rules of the City of New York is
3 REPEALED and a new Section 1-07 is added to read as follows:

4 §1-07 Post-Employment

5 (a) Post-Employment Appearances

6 (1) For the purposes of the restrictions set forth in Charter § 2604(d) on appearances
7 by a former public servant before their former City agency or branch of City
8 government, or the City, such prohibited appearances include compensated
9 communications with representatives of that former agency or branch of City
10 government sitting as members of City boards, commissions, or other governmental
11 entities.

12 (2) The restrictions set forth in Charter § 2604(d) on appearances by a former public
13 servant do not include appearances related to non-City matters.

14 (b) Date of Termination of City Service

15 (1) For purposes of Charter § 2604(d)(2), the date of termination of a former public
16 servant's City service is the later of the last day a former public servant performed
17 official City duties or the last day they received benefits conditioned upon current
18 City employment.

19 (2) A former public servant who has served more than one City agency within one year
20 prior to the termination of such public servant's service with the City may not
21 appear before each such City agency for a period of one year after the termination
22 of service from each such agency.

23 (c) Waivers of the Post-Employment Restrictions

1 (1) In determining whether to issue a waiver pursuant to Charter § 2604(e) of the post-
2 employment restrictions of Charter § 2604(d) the Board will consider the totality
3 of the circumstances, including, but not limited to:

4 (i) whether the City shares an identity of interest with, or controls or
5 effectively controls, the former public servant's private employer;

6 (ii) whether the former public servant is uniquely suited to perform
7 work that would benefit the City because:

8 1. the private employer has no other employees able to engage in the
9 proposed appearances or work; or

10 2. the former public servant has rare or unique technical or professional
11 expertise necessary to engage in the proposed appearances or work;

12 (iii) whether the former public servant is unlikely to exercise undue
13 influence on government decision-making because they were a public
14 servant for only a short period of time; and

15 (iv) whether the former public servant's proposed appearances or work
16 do not pose a risk of harm to firms similar to, or in competition, with the
17 former public servant's private employer.

18 (2) The Board will not grant requests for waivers of Charter § 2604(d):

19 (i) made after undue delay; or

20 (ii) for former public servants who were not fully and formally recused
21 from all particular matters involving the private employer from the time of
22 soliciting or negotiating for employment with the private employer through
23 the termination of their City service.

1 (d) Consulting for a Former City Agency

2 (1) Pursuant to Charter § 2604(d)(6), with the written approval of the agency head, a
3 former public servant may be directly retained by their former City agency as a
4 consultant within one year of the termination of their City service, and may work
5 on particular matters with which they were personally and substantially involved,
6 provided that:

7 (i) the consulting arrangement is made for the purpose of continuing or
8 completing work left unfinished by the former public servant at the time
9 their City service terminated, or for training their replacement, or for filling
10 a vacancy until a replacement can be hired;

11 (ii) the duration of the consulting arrangement is no longer than
12 reasonably necessary;

13 (iii) the former public servant has technical, professional, or other
14 subject-matter expertise or skills not otherwise available among the
15 agency's employees;

16 (iv) the compensation is comparable to what the former public servant
17 last earned at the agency; and

18 (v) within 30 days the written approval of the agency head is disclosed
19 to the Conflicts of Interest Board, which approval will be posted on the
20 Board's website.

21 (2) Where a proposed consulting arrangement between a City agency and a former
22 public servant does not meet all of the requirements set forth in paragraph (1) of

1 this subdivision and is therefore not covered by Charter § 2604(d)(6), a waiver may
2 be sought for such a proposed arrangement pursuant to Board Rules § 1-07(c).

3 (3) Pursuant to Charter § 2604(e), a consulting arrangement between a former public
4 servant and their former agency that meets the requirements of paragraph (1) of this
5 subdivision but under which the former public servant is retained through a private
6 firm for the administrative convenience of the City may be entered into if:

7 (i) the former public servant played no role in the recommendation or
8 selection of the private firm in his or her work as a public servant; and

9 (ii) after receiving written approval of the head of the City agency, the
10 Board determines that the proposed consulting arrangement would provide
11 a benefit to the City distinct from the benefit to the former public servant or
12 to the private firm.

1 **NEW YORK CITY LAW DEPARTMENT**
2 **DIVISION OF LEGAL COUNSEL**
3 **100 CHURCH STREET**
4 **NEW YORK, NY 10007**
5 **212-356-4028**

6
7 **CERTIFICATION PURSUANT TO**
8 **CHARTER §1043(d)**
9

10 **RULE TITLE:** Amendment of Rules Governing Post-Employment Restrictions

11 **REFERENCE NUMBER:** 2020 RG 036

12 **RULEMAKING AGENCY:** Conflicts of Interest Board
13

14 I certify that this office has reviewed the above-referenced proposed rule as
15 required by section 1043(d) of the New York City Charter, and that the above-referenced proposed
16 rule:
17

- 18 (i) is drafted so as to accomplish the purpose of the authorizing provisions of
19 law;
20 (ii) is not in conflict with other applicable rules;
21 (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its
22 stated purpose; and
23 (iv) to the extent practicable and appropriate, contains a statement of basis and
24 purpose that provides a clear explanation of the rule and the requirements
25 imposed by the rule.
26

27 /s/ STEVEN GOULDEN
28 Acting Corporation Counsel
29
30
31
32
33
34
35
36

Date: June 25, 2020

1 **NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS**

2 **253 BROADWAY, 10th FLOOR**

3 **NEW YORK, NY 10007**

4 **212-788-1400**

5 **CERTIFICATION / ANALYSIS**

6 **PURSUANT TO CHARTER SECTION 1043(d)**

7
8 **RULE TITLE: Amendment of Rules Governing Post-Employment Restrictions**

9 **REFERENCE NUMBER: COIB-16**

10 **RULEMAKING AGENCY: Conflicts of Interest Board**

11
12 I certify that this office has analyzed the proposed rule referenced above as required by Section
13 1043(d) of the New York City Charter, and that the proposed rule referenced above:

14
15 (i) Is understandable and written in plain language for the discrete regulated
16 community or communities;

17
18 (ii) Minimizes compliance costs for the discrete regulated community or
19 communities consistent with achieving the stated purpose of the rule; and

20
21 (iii) Does not provide a cure period because it does not establish a violation, modification of a
22 violation, or modification of the penalties associated with a violation.

23
24
25 /s/ Francisco X. Navarro

June 26, 2020

26 Mayor's Office of Operations

Date

1 New York City Conflicts of Interest Board

2
3 **Notice of Public Hearing and Opportunity to Comment on Proposed Rules Regarding Post-**
4 **Employment Restrictions**
5

6 **What are we proposing?** The Conflicts of Interest Board is proposing to establish rules governing the
7 issuance of waivers of the post-employment restrictions and the definition of terms related to those
8 restrictions.

9
10 **When and where is the Hearing?** The Conflicts of Interest Board will hold a public hearing on the
11 proposed rule. The public hearing will take place by videoconference at [time] on [date] and is accessible
12 by:

- 13
14 • **Internet Video and Audio.** To access the hearing by Zoom, use the following URL: [].
15
16 • **Telephone.** To access the hearing by telephone, dial []. When prompted, use the following
17 access code [] and password [].
18

19 **How do I comment on the proposed rules?** Anyone can comment on the proposed rules by:

- 20
21 • **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules
22 website at <http://rules.cityofnewyork.us>.
23
24 • **Email.** You can email comments to Chad H. Gholizadeh at Rules@COIB.nyc.gov
25
26 • **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public
27 hearing may speak for up to three minutes. Please access the public hearing by internet video and
28 audio or by telephone using the instructions above. It is recommended, but not required, that
29 commenters sign up prior to the hearing by contacting the Conflicts of Interest Board by phone at
30 (212) 437-0730 or by email at lee@coib.nyc.gov.
31

32 **Is there a deadline to submit comments?** Yes, you must submit written comments by [date].
33

34 **Do you need assistance to participate in the hearing?** You must tell the Conflicts of Interest Board if
35 you need a reasonable accommodation of a disability at the hearing, including if you need a sign language
36 interpreter or simultaneous transcription. You can advise us by email at lee@coib.nyc.gov or by telephone
37 at (212) 437-0730. You must tell us by [date].
38

39 **Can I review the comments made on the proposed rules?** You can review the comments made online
40 on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. Copies of all comments
41 submitted online, copies of all written comments, and a summary of oral comments concerning the
42 proposed rule will be available to the public on the Conflicts of Interest Board's
43 website(<https://www1.nyc.gov/site/coib/public-documents/open-meetings-and-public-hearings.page>) as
44 soon as practicable.
45

1 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043, 2603(a), and
2 2603(c)(4) of the City Charter authorize the Conflicts of Interest Board to promulgate this proposed rule.

3
4 **Where can I find the Conflicts of Interest Board's rules?** The Conflicts of Interest Board's rules are
5 in Title 53 of the Rules of the City of New York. The proposed rule was included in the agency's FY '21
6 Regulatory Agenda.

7
8 **What rules govern the rulemaking process?** The Conflicts of Interest Board must meet the
9 requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made
10 according to the requirements of Section 1043 of the City Charter.

11 12 **STATEMENT OF BASIS AND PURPOSE**

13 The post-employment restrictions of Chapter 68 of the City Charter, contained in Charter
14 § 2604(d), seek to balance two competing City interests:

15 (1) the need to recruit to public service talented individuals who may wish to return to or
16 pursue private sector employment after their City service, and

17 (2) the need to prevent public servants from trading on connections made in City
18 government service or using confidential City information for the benefit of themselves or future
19 employers.

20 See Volume I, Report of the New York City Charter Revision Commission, December
21 1986 – November 1988, at 28-29; see also Advisory Opinions (“A.O.”) Nos. 1993-11 at 6, 1993-
22 12 at 4, 1994-15 at 11-12, and 1996-1 at 7.

23 Since it was established in 1989, the Board has issued 31 advisory opinions, totaling 210
24 pages, providing guidance on the application of the post-employment restrictions set forth in
25 Charter § 2604(d) and on how the Board has considered requests for waivers of those restrictions.
26 Because of the limited scope and duration of the post-employment restrictions, requests for
27 waivers of Charter § 2604(d) are never merely technical, and the Board has engaged in a detailed
28 review of the competing interests at issue in each request. With the benefit of almost 30 years of

1 experience in evaluating requests for post-employment waivers, and in fulfillment of the mandate
2 of Charter § 2603(c)(4) to determine which of its advisory opinions “has interpretative value in
3 construing provisions of this chapter,” the Board proposes to codify:

- 4 • Definitions of terms within Charter § 2604(d), such as “agency served” and “termination
5 of service.”
- 6 • A new “totality of the circumstances” standard with a non-exclusive list of four factors,
7 drawn from advisory opinions, the Board will consider when evaluating requests for
8 waivers of the post-employment restrictions.
- 9 • The standard, also drawn from advisory opinions, for evaluating a unique type of post-
10 employment work: consulting for one’s former City agency, known as “consulting
11 back.”

12 The proposed rule addresses the following 22 advisory opinions:

13 A.O. No. 1991-8, A.O. No. 1991-19, A.O. No. 1992-13, A.O. No. 1992-17,
14 A.O. No. 1992-37, A.O. No. 1992-38, A.O. No. 1993-11, A.O. No. 1993-
15 12, A.O. No. 1993-18, A.O. No. 1993-30, A.O. No. 1994-15, A.O. No.
16 1994-19, A.O. No. 1994-22, A.O. No. 1995-1, A.O. No. 1996-1, A.O. No.
17 1998-11, A.O. No. 2000-2, A.O. No. 2008-1, A.O. No. 2008-4, A.O. No.
18 2009-5, A.O. No. 2012-2, and A.O. No. 2019-1.

19 Certain post-employment issues considered by the Board are not the subject of this
20 rulemaking, specifically the advisory opinions interpreting Charter § 2604(d)(6), which the Board
21 reserves for the subject of possible future rulemaking. See A.O. No. 1993-13, A.O. No. 1994-7,
22 A.O. No. 1994-21, A.O. No. 1997-1, and A.O. No. 1999-3. The Board is not adopting A.O. Nos.
23 1989-1, 1992-2, 1992-32, and 2007-1, which apply only to the public servants who requested those
24 opinions.

25 **1. Definitions**

26 **a. Post-Employment Appearances**

1 Proposed Board Rules § 1-07(a)(1) would codify the Board’s long-standing interpretation
2 that the prohibitions in Charter §§ 2604(d)(2), 2604(d)(3), and 2604(d)(4) ~~prohibit against~~ a former
3 public servant from appearing before or communicating with ~~any City board or commission on~~
4 ~~which a representative of his or her~~ former ~~City~~ agency, ~~or~~ branch of ~~City~~ government, served
5 include appearances before or communications with representatives of that agency or ~~the branch~~
6 serving on a City ~~serves~~ board or commission. For example, an employee of the New York City
7 Department of Housing Preservation and Development (“HPD”) would be prohibited by Charter
8 § 2604(d)(2) from appearing ~~before~~ at a meeting of the board of the New York City Housing
9 Development Corporation (“HDC”) within ~~the~~ the former HPD employee’s first post-
10 employment year ~~because if the HPD~~ representative ~~of HPD sits~~ sitting on the HDC board ~~of~~
11 ~~HDC~~ is participating in that meeting. See A.O. No. 2008-1 (advising that when a public servant
12 simultaneously holds positions at multiple City agencies the post-employment appearance
13 restriction of Charter § 2604(d)(2) applies to each position); see also COIB v. Sirefman, COIB
14 Case No. 2007-847 (2009) (fining the former Interim President of the New York City Economic
15 Development Corporation (“EDC”) \$1,500 for appearing before the Hudson Yards Development
16 Corporation (“HYDC”) within one year of his resignation from EDC because the current EDC
17 President was present at a meeting attended by the former Interim President in the EDC President’s
18 capacity as an *ex-officio* Member and Director of HYDC). By contrast, a former HPD employee
19 would not be prohibited from communicating with other employees of HDC ~~because that~~
20 ~~appearance is not~~, nor would the former employee be prohibited from communicating with or
21 appearing before meetings of the HDC board ~~on~~ from which ~~their former agency’s representatives~~
22 ~~sit~~ the HPD representative was absent or recused.

1 Proposed Board Rules § 1-07(a)(2) would codify the Board's interpretation that the
2 appearance and communication restrictions of Charter § 2604(d) exclude appearances and
3 communications related to non-City matters. In particular, the Board has advised public servants
4 that the following communications are not prohibited by Charter § 2604(d): (1) social
5 communications; (2) soliciting a public servant's personal legal business or other types of personal
6 services; and (3) seeking an endorsement for a run for political office. See A.O. No. 2009-5
7 (advising a former public servant that the post-employment appearance restriction did not prohibit
8 communication with a current public servant in their private capacity, such as reaching out to
9 perform personal legal work, asking them to leave City employment to join the former public
10 servant's new firm, or soliciting a political endorsement).

11 **b. Date of Termination of City Service**

12 To advise a public servant about the applicability of Charter § 2604(d), the Board must
13 determine when the public servant's City service ended. In proposed Board Rules § 1-07(b)(1),
14 the Board would incorporate the method of calculating the date of a public servant's termination
15 from City service set forth in A.O. Nos. 1998-11 and 2019-1: that is, the later of either the last day
16 sueha former public servant performed official City duties or the last day the public servant
17 received benefits conditioned upon current City employment after resigning, retiring, or being
18 terminated. The one-year appearance prohibition of Charter § 2604(d)(2) would run from that
19 date.

20 In proposed Board Rules § 1-07(b)(2), the Board would retain the substance of existing
21 Board Rules § 1-07 and would codify A.O. No. 2008-1 for public servants who serve multiple City
22 agencies. See also A.O. No. 1993-30 (providing advice on the tolling dates of the one-year
23 appearance restriction to a public servant who served two agencies in succession before leaving

1 City service). The proposed rule would clarify that a former public servant who has served more
2 than one City agency, concurrently or sequentially, is prohibited from appearing before each such
3 agency for one year after the termination of service, as determined by proposed Board Rules § 1-
4 07(b)(1), with each such agency.

5 **2. Otherwise Prohibited Conduct**

6 **a. Waivers of the Post-Employment Restrictions**

7 In contrast to the broad prohibitions against full-time public servants having ownership
8 interests in or positions at firms that do business with any City agency, for the vast majority of
9 public servants, the post-employment appearance restrictions apply only to a former public
10 servant's communications with their former employing City agency or branch of government and
11 only for one year after leaving City service. Similarly, the lifetime post-employment particular
12 matter restriction applies only to a narrow set of matters (as defined in Charter § 2601(17)) on
13 which a former public servant worked personally and substantially while in City service. See, e.g.,
14 A.O. No. 1992-38 (advising that a public servant was not prohibited from working on a project
15 where her involvement had been personal but not substantial).

16 However, because public servants requesting waivers of the post-employment restrictions
17 are seeking to engage in conduct in which the relationships developed in their former City position
18 may influence decision-making by their former City agency, or that may put them in a position to
19 utilize their superior familiarity with, and ability to navigate, the subtle culture of their former
20 agency to achieve preferential treatment for their private employer, or involve the exact particular
21 matters on which the former public servant personally and substantially worked while in City
22 service, the Board has analyzed requests for waivers of the post-employment restrictions
23 differently from waivers of other provisions of Chapter 68.

1 In evaluating the many requests for waivers it has received, the Board has sought to balance
2 adhering to the post-employment restrictions of the Charter with the asserted need for a particular
3 former public servant to engage in otherwise prohibited conduct to further an identified City
4 interest. In A.O. No. 1991-8, the Board announced that it would issue waivers of Chapter 68's
5 post-employment restrictions "sparingly, and only in exigent cases." A.O. No. 1991-8 at 2-3; see
6 also A.O. No. 1992-13 (declining to issue a waiver to a public servant seeking to communicate
7 with their former branch of government on behalf of a private employer).

8 The Board has traditionally considered four factors when evaluating requests for post-
9 employment waivers:

- 10 (1) the relationship between the City and the public servant's private employer;
11 (2) the benefits to the City (as opposed to the public servant) if the waiver were granted;
12 (3) the likelihood of harm to other organizations similar to, or in competition with, a public
13 servant's prospective employer if the waiver were granted; and
14 (4) the extent to which the public servant has unique skills or experience suited to the
15 particular position that the prospective employer would be hard-pressed to find in another person
16 (see, e.g., A.O. No. 2012-2).

17 In applying this long-utilized test, the Board has determined that, when the former public
18 servant's private employer was a not-for-profit organization working in a public-private
19 partnership with the City in which the private employer and the City share an identity of interest,
20 all four factors "need not be satisfied." A.O. No. 2000-2 at 4; see A.O. No. 2008-4. The Board
21 has further explained that, for private employers that devote substantial private resources to
22 support the work of a City agency but which do not meet the standard of a public-private

1 partnership, requests for waivers will “be analyzed in light of [the private employer’s] hybrid
2 status.” A.O. No. 2008-4 at 10.

3 Since 1991, the Board has grappled with articulating and applying a standard to requests
4 for waivers of the post-employment restrictions that would fulfill the objectives of the post-
5 employment restrictions while also addressing the needs of City agencies and the City’s changing
6 relationship with not-for-profit partners. Over the course of these years, it has become clear that
7 the Board would benefit from the consideration of a more complete set of circumstances. Proposed
8 Board Rules §1-07(c)(1) would codify a new “totality of the circumstances” standard for
9 determining whether a waiver of the post-employment restrictions would conflict with the
10 purposes and interests of the City. As part of how the Board would evaluate the totality of the
11 circumstances, proposed Board Rules §1-07(c)(1) would include a non-exhaustive list of four
12 factors drawn from the Board’s past deliberations on post-employment waivers.

13 Proposed Board Rule § 1-07(c)(1)(i): When a former public servant’s work for a private
14 employer involves furthering an interest identical to that of the City, there are diminished concerns
15 about such former public servant using their special access or knowledge to the detriment of the
16 City’s interests. Therefore, the Board has historically been more likely to grant requests for
17 waivers for former public servants who work for entities that the City controls or effectively
18 controls. See A.O. 2008-4 (observing that the Board would look favorably upon requests to work
19 for City-affiliated not-for-profits when those entities were created by City agencies and had a
20 governing structure that involved public officials as officers or board members). Additionally, in
21 the past the Board has granted waivers in situations where the former public servant’s private
22 employer operates as a public-private partnership with the City and devotes substantial private
23 resources to support the work of a City agency. See A.O. No. 2008-4 (stating that, “[w]hen the

1 City and [a private employer] share an ‘identity of interest,’ the City benefits from encouraging
2 former City employees to effectively remain in public service” by working for that private
3 employer); A.O. No. 1994-22 (granting a waiver for a public servant to take a position at a bio-
4 medical facility which operated as a joint venture between the City, the State, and a university).

5 Proposed Board Rule § 1-07(c)(1)(ii): When a former public servant is uniquely suited to
6 perform work that would benefit the City, rather than their private employer, the proposed post-
7 employment activities do not conflict with the purposes and interest of the City. See A.O. No.
8 2012-2 (stating that, in evaluating a request for a waiver of the post-employment restrictions, “the
9 Board looks for a demonstration of the benefit *to the City*, not to the new employer”) (emphasis in
10 original). The potential benefit to the City has been articulated in two ways: either by virtue of the
11 former public servant’s unique technical or professional expertise or because at a small not-for-
12 profit, there is no other employee able to do the prohibited work. See A.O. No. 1992-17 (granting
13 a public servant a waiver of the post-employment restrictions to work for an entity when his
14 expertise would help remedy contractual disputes between the entity and the agency); A.O. No.
15 1994-19 (granting a waiver of Charter § 2604(d)(3) when a public servant’s proposed
16 communications on behalf of a not-for-profit entity would primarily benefit the City).

17 Proposed Board Rule § 1-07(c)(1)(iii): Because public servants who have worked for the
18 City for brief periods of time are less likely than those who served for extended periods of time in
19 City government to have developed the type of connections that could afford them undue influence
20 or unfair access, the Board has issued post-employment waivers for these public servants more
21 readily. See COIB Case No. 2019-463 (40 days); COIB Case No. 2017-790 (36 days); COIB Case
22 No. 2017-214 (38 days); COIB Case No. 2015-646 (40 days); COIB Case No. 2013-381 (granting
23 a waiver for a former paid summer intern). Additionally, public servants whose City service was

1 part-time on a consultative body have been granted post-employment waivers more frequently in
2 light of the limited role they played in City government.

3 Proposed Board Rule § 1-07(c)(1)(iv): A former public servant communicating with their
4 former agency on behalf of a private employer shortly after departing may pose a risk of harm to
5 firms similar to or in competition with that private employer, given the former public servant's
6 familiarity with, and ability to navigate, the processes of their former agency. To mitigate this
7 risk, the Board would continue to disfavor requests in which the former public servant proposes to
8 communicate with units or divisions at the former agency with which he or she worked regularly.
9 See A.O. No. 1993-8 (stating that one of the purposes of the post-employment restrictions was to
10 prevent the exertion of special influence on government decision-making by, among other things,
11 preventing contact with former City colleagues on behalf of a new employer); A.O. No. 1994-15
12 (granting a waiver of the one-year appearance restriction for a public servant working for a unique
13 not-for-profit created by New York State to communicate with a unit of his former City agency
14 other than the one for which he worked). Additionally, the Board would continue to disfavor
15 requests for waivers for former public servants who wish to communicate with their former
16 agencies to seek new business for their private employers in the forms of licenses, permits, grants,
17 or contracts. Compare A.O. No. 1992-17 (granting a waiver of the post-employment restrictions
18 to a public servant when her work at a private employer "would help remedy pending contractual
19 disputes between the entity and the agency") with A.O. No. 1993-18 (declining to grant a waiver
20 to a public servant whose work at his private employer would focus, in part, on encouraging the
21 participation of his private employer's clients in programs run by his former City agency); see also
22 A.O. No. 1991-19 (prohibiting a public servant making an otherwise ministerial FOIL request from
23 bypassing normal procedures to contact individuals directly).

1 Additionally, in proposed Board Rules § 1-07(c)(2), the Board would establish two
2 procedural requirements for waivers of the post-employment restrictions. First, the Board would
3 decline to issue waivers when the request is made after undue delay. In considering such requests,
4 the Board’s decision-making is hindered by a lack of time to evaluate the specific circumstances
5 of the request as well as the complications that, in the Board’s experience, often accompany such
6 requests, most commonly the former public servant having already accepted (or started) a job that
7 requires otherwise prohibited communications. The Board has emphasized this factor to ensure
8 that self-created exigencies do not take precedence over other relevant factors. See A.O. No. 2012-
9 2 (advising that request for waivers of the post-employment restrictions should be submitted in
10 advance of departure from City service); A.O. No. 1992-37 (noting with disapproval that a former
11 public servant did not request a waiver prior to having accepted the position with a private
12 employer).

13 Second, the Board would decline to issue waivers when a former public servant has, in the
14 course of soliciting employment, violated Charter § 2604(d)(1), which requires recusal from any
15 particular matters involving a private employer while soliciting or negotiating for a position with
16 that employer. See A.O. No. 1992-37 (observing that a former public servant's solicitation and
17 negotiation for a position with a private employer that had business dealings with her own agency
18 raised the possibility that a violation of Charter Section 2604(d)(1) had occurred).

19 **3. Consulting for a Former City Agency**

20 As part of its experience applying the post-employment restrictions, the Board has also
21 considered how those restrictions impact the City’s ability to retain the expertise held by retiring
22 and departing City employees. The Board’s approach to this issue has been informed by Charter
23 § 2604(d)(6), the so-called “government-to-government” exception, which provides that the post-

1 employment restrictions “shall not apply to positions with or representation on behalf of any local,
2 state or federal agency.” Historically, the Board has determined that a City agency’s consulting
3 agreement with a former employee falls within the government-to-government exception when:
4 (1) the former agency has a pressing need for the former employee’s services, (2) the former
5 agency contracts directly with the former employee, not through a firm employing the former
6 public servant, and (3) the contracting compensation is comparable to that of the employee’s salary
7 at the time he or she left the agency. See A.O. Nos. 1993-12; 1995-1. Proposed Board Rules § 1-
8 07(d)(1) would provide a new set of five more specific and detailed conditions which, if met,
9 would permit a former public servant to be retained directly, rather than through an employer, as
10 a consultant by the City agency for which he or she worked with the written approval of the agency
11 head. Such written approval must then be provided to the Board, which will post that information
12 on its website.

13 The Board has also reviewed matters where, for reasons of administrative convenience, a
14 City agency seeks to employ a former employee as a consultant through an intermediary entity,
15 rather than directly as a consultant. This often arises when a City agency seeks to retain a public
16 servant as a consultant through a temporary staffing agency with which the agency already has a
17 staffing contract. In this case, because the former public servant would be an employee of the
18 temporary staffing agency or other intermediary entity, the “government-to-government”
19 exception of Charter § 2604(d)(6) would not apply. However, because in many circumstances the
20 consulting arrangement is motivated by the same City purpose that motivates direct consulting
21 arrangements, the Board has often issued waivers to public servants whose former City agencies
22 seek to employ them in this manner when it has determined there is no likelihood that the
23 intermediary entity may reap disproportionate benefits from the City agency’s need to retain its

1 former employee. See A.O. No. 1995-1 at 6. In proposed Board Rules § 1-07(d)(2) the Board
2 articulates a standard that such waivers must meet, incorporating the requirements of proposed
3 Board Rules § 1-07(d)(1), but also requiring that the intermediary entity is selected by the City
4 rather than by the public servant.

5 New material is underlined.

6 Section 1. Section 1-07 of Chapter 1 of Title 53 of the Rules of the City of New York is
7 REPEALED and a new Section 1-07 is added to read as follows:

8 §1-07 Post-Employment

9 (a) Post-Employment Appearances

10 (1) For the purposes of the restrictions set forth in Charter § 2604(d) on appearances
11 by a former public servant before their former City agency or branch of City
12 government, or the City, such prohibited appearances include compensated
13 communications with ~~any City board, commission, or other governmental entity on~~
14 ~~which a representative~~representatives of ~~their~~that former agency or branch of City
15 government ~~sit~~sitting as members of City boards, commissions, or other
16 governmental entities.

17 (2) The restrictions set forth in Charter § 2604(d) on appearances by a former public
18 servant do not include appearances related to non-City matters.

19 (b) Date of Termination of City Service

20 (1) For purposes of Charter § 2604(d)(2), the date of termination of a former public
21 servant's City service is the ~~later of the~~ last day ~~such~~a former public servant
22 performed official City duties or ~~the last day they~~ received benefits conditioned
23 upon current City employment ~~after resigning, retiring, or being terminated.~~

1 (2) A former public servant who has served more than one City agency within one year
2 prior to the termination of such public servant's service with the City may not
3 appear before each such City agency for a period of one year after the termination
4 of service from each such agency.

5 (c) Waivers of the Post-Employment Restrictions

6 (1) In determining whether to issue a waiver pursuant to Charter § 2604(e) of the post-
7 employment restrictions of Charter § 2604(d) the Board will consider the totality
8 of the circumstances, including, but not limited to:

9 (i) whether the City shares an identity of interest with, or controls or
10 effectively controls, the former public servant's private employer;

11 (ii) whether the former public servant is uniquely suited to perform
12 work that would benefit the City because:

13 1. the private employer has no other employees able to engage in the
14 proposed appearances or work; or

15 2. the former public servant has rare or unique technical or professional
16 expertise necessary to engage in the proposed appearances or work;

17 (iii) whether the former public servant is unlikely to exercise undue
18 influence on government decision-making because they were a public
19 servant for only a short period of time; and

20 (iv) whether the former public servant's proposed appearances or work
21 do not pose a risk of harm to firms similar to, or in competition, with the
22 former public servant's private employer.

23 (2) The Board will not grant requests for waivers of Charter § 2604(d):

- 1 (i) made after undue delay; or
- 2 (ii) for former public servants who were not fully and formally recused
- 3 from all particular matters involving the private employer from the time of
- 4 soliciting or negotiating for employment with the private employer through
- 5 the termination of their City service.

6 (d) Consulting for a Former City Agency

7 (1) Pursuant to Charter § 2604(d)(6), with the written approval of the agency head, a

8 former public servant may be directly retained by their former City agency as a

9 consultant within one year of the termination of their City service, and may work

10 on particular matters with which they were personally and substantially involved,

11 provided that:

- 12 (i) the consulting arrangement is made for the purpose of continuing or
- 13 completing work left unfinished by the former public servant at the time
- 14 their City service terminated, or for training their replacement, or for filling
- 15 a vacancy until a replacement can be hired;
- 16 (ii) the duration of the consulting arrangement is no longer than
- 17 reasonably necessary;
- 18 (iii) the former public servant has technical, professional, or other
- 19 subject-matter expertise or skills not otherwise available among the
- 20 agency's employees;
- 21 (iv) the compensation is comparable to what the former public servant
- 22 last earned at the agency; and

1 (v) within 30 days the written approval of the agency head is disclosed
2 to the Conflicts of Interest Board, which approval will be posted on the
3 Board's website.

4 (2) Where a proposed consulting arrangement between a City agency and a former
5 public servant does not meet all of the requirements set forth in paragraph (1) of
6 this subdivision and is therefore not covered by Charter § 2604(d)(6), a waiver may
7 be sought for such a proposed arrangement pursuant to Board Rules § 1-07(c).

8 (3) Pursuant to Charter § 2604(e), a consulting arrangement between a former public
9 servant and their former agency that meets the requirements of paragraph (1) of this
10 subdivision but under which the former public servant is retained through a private
11 firm for the administrative convenience of the City may be entered into if:

12 (i) the former public servant played no role in the recommendation or
13 selection of the private firm in his or her work as a public servant; and

14 (ii) after receiving written approval of the head of the City agency, the
15 Board determines that the proposed consulting arrangement would provide
16 a benefit to the City distinct from the benefit to the former public servant or
17 to the private firm.

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4 **NEW YORK CITY LAW DEPARTMENT**
5 **DIVISION OF LEGAL COUNSEL**
6 **100 CHURCH STREET**
7 **NEW YORK, NY 10007**
8 **212-356-4028**

9
10 **CERTIFICATION PURSUANT TO**
11 **CHARTER §1043(d)**
12

13 **RULE TITLE:** Amendment of Rules Governing Post-Employment Restrictions

14 **REFERENCE NUMBER:** 2020 RG 036

15 **RULEMAKING AGENCY:** Conflicts of Interest Board
16

17 I certify that this office has reviewed the above-referenced proposed rule as
18 required by section 1043(d) of the New York City Charter, and that the above-referenced proposed
19 rule:

- 20
21 (i) is drafted so as to accomplish the purpose of the authorizing provisions of
22 law;
23 (ii) is not in conflict with other applicable rules;
24 (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its
25 stated purpose; and
26 (iv) to the extent practicable and appropriate, contains a statement of basis and
27 purpose that provides a clear explanation of the rule and the requirements
28 imposed by the rule.
29

30 /s/ STEVEN GOULDEN

Date: June 25, 2020

1 Acting Corporation Counsel
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10 **NEW YORK CITY MAYOR’S OFFICE OF OPERATIONS**

11 **253 BROADWAY, 10th FLOOR**

12 **NEW YORK, NY 10007**

13 **212-788-1400**

14 **CERTIFICATION / ANALYSIS**

15 **PURSUANT TO CHARTER SECTION 1043(d)**
16

17 **RULE TITLE: Amendment of Rules Governing Post-Employment Restrictions**

18 **REFERENCE NUMBER: COIB-16**

19 **RULEMAKING AGENCY: Conflicts of Interest Board**
20

21 I certify that this office has analyzed the proposed rule referenced above as required by Section
22 1043(d) of the New York City Charter, and that the proposed rule referenced above:
23

24 (i) Is understandable and written in plain language for the discrete regulated
25 community or communities;

26
27 (ii) Minimizes compliance costs for the discrete regulated community or
28 communities consistent with achieving the stated purpose of the rule; and

29
30 (iii) Does not provide a cure period because it does not establish a violation, modification of a
31 violation, or modification of the penalties associated with a violation.

1

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3 /s/ Francisco X. Navarro

June 26, 2020

4 Mayor's Office of Operations

Date

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